Nos. 78-160, 78-161 and 78-162

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY TIBBALS WILSON, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

STATE OF IOWA, ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

RGP, INC., ET AL., PETITIONERS

v.

OMAHA INDIAN TRIBE and
THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A67) is reported at 575 F.2d 620. The opinions of the district court (Pet. App. B1-B61, Pet. App. C1-C21) are reported at 433 F. Supp. 67 and 57.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1978. A petition for rehearing was denied on May 2, 1978. The petitions for a writ of certiorari were filed on July 28, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

25 U.S.C. 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 194, which in terms applies to property actions between "an Indian" and "a white person," is applicable to the instant action brought by an Indian tribe and by the United States as trustee against individuals, corporations, and the State of Iowa.

2. Whether 25 U.S.C 194 creates a racial classification that violates the Due Process Clause of the Fifth Amendment.

3. Whether the court of appeals erred in applying federal common law rather than state law to determine the river boundary of an Indian reservation that coincided with the border between two states (Nos. 78-160 and 78-161).

4. Whether the court of appeals erred in holding that an avulsion may occur when there is a sudden change of the thalweg of a river (No. 78-160).

STATEMENT

These consolidated actions were brought by the Omaha Indian Tribe and the United States as trustee for the Tribe to quiet title to approximately 2,900 acres of land bordering on the Missouri River.[1] In 1854, the United States entered into a treaty with the Omaha Tribe of Indians (Pet. App. A2 & n.1).[2] Pursuant to the treaty a reservation was established on land riparian to the Missouri River, within the present State of Nebraska. The boundary of the reservation was the center of the main channel of the Missouri River (*id.* at A6 & n.5). The reserva-

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[1] The Tribe filed two actions which included a claim for a total of approximately 11,000 acres. When the Tribe's actions were consolidated with the government's action claiming 2,900 acres of the same land on behalf of the Tribe, the Tribe's claim for approximately 8,000 additional acres was severed for later consideration (Pet. App. B3, B5).

[2] The treaty is reprinted at 10 Stat. 1043.

tion was officially surveyed in 1867 by T. H. Barrett of the General Land Office of the United States (*id.* at A5), and the survey map showed that the reservation included a substantial peninsula jutting east toward the Iowa side of the river (see Plate I, Pet. App. A10). That peninsula is referred to as the Blackbird Bend area.

Between 1867 and 1923, the river changed its course a number of times, sometimes moving eastward and sometimes to the west (Pet. App. A7-A9). Since at least 1927 the river has been west of its 1867 position, and much of the Blackbird Bend area has been on the Iowa side of the river, separated from the remainder of the reservation. As this tract gradually dried out, settlers arrived and began to farm the land. Petitioners, who are settlers or successors in title to settlers, farmed much of the land until 1975, when the Tribe took possession (*id.* at A4).[3]

Applying Nebraska law, the district court concluded (Pet. App. B49-B50) that the Blackbird Bend peninsula shown in the Barrett survey was washed away by gradual erosion, and new land was added to the Iowa shore by accretion. Accordingly, judgment was entered for petitioners quieting title in them (Pet. App. D1-D3).

The court of appeals reversed, finding that the trial court's ruling was marred by three fundamental legal

[3] The district court granted a preliminary injunction permitting the Tribe's continued occupancy during the pendency of this litigation, but requiring accounting of the profits (*ibid.*).

errors (Pet. App. A1-A67). First, the court held (*id.* at A13-A20) that the district court had erred in applying Nebraska law, rather than federal law, in evaluating the facts of the case. It concluded (*id.* at A13-A15) that federal law controlled because the boundary of the reservation at the time of the changes in the course of the river was coextensive with the interstate boundary. Moreover, the court pointed out that the Tribe asserted a right to Indian trust land arising under and protected by federal law (*id.* at A15-A20). Second, the court concluded (*id.* at A20-A25) that the district court had improperly put the burden of proof on the Tribe. Congress' long-standing protectionist policy with regard to Indians is expressed in 25 U.S.C. 194, which places the burden of proof on a party seeking to divest an Indian of title to land. Since the Tribe had proved that the Blackbird Bend area, as depicted by the Barrett survey, was originally within the reservation, petitioners had the burden of proving that the Tribe no longer held title. Third, the court concluded that the district court had based its ruling upon too narrow a definition of avulsion, erroneously "focus[ing] on identifiable land in place as the sole criterion of avulsion * * *" (*id.* at A27).

Turning to the district court's findings of fact, the court of appeals concluded, after a detailed review of the testimony and exhibits (*id.* at A65; footnote omitted):

> considered in the context of the broader parameters of avulsion we hold that [petitioners']

> case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194.

ARGUMENT

1. The principal contention of all petitioners is that 25 U.S.C. 194 violates the Due Process Clause because it creates an invidious racial classification (No. 78-160 Pet. 11-18; No. 78-161 Pet. 10-11; No. 78-162 Pet. 6-15). In our view, the court of appeals correctly upheld the validity of the statute, and in any event the constitutional question is not, at least at the present time, ripe for review by this Court.

a. As this Court stated in *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974), the resolution of petitioners' Due Process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress' judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 554-555. In *United States* v. *Antelope*, 430 U.S. 641, 645

(1977) (footnote omitted), the Court reaffirmed this analysis, holding that—

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard this vital Tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

b. In any event, the instant case is not an appropriate vehicle for consideration of the constitutional issue petitioners raise. There is no conflict among the circuits. Indeed, as petitioners acknowledge (No. 78-160 Pet. 11; No. 78-162 Pet. 7 n.8), this is a question of first impression, since no recorded decision prior to the instant case has considered the constitutionality or the construction of Section 194. Moreover, even in the instant case, the question has received little attention. The district court, which

found Section 194 inapplicable, did not consider the constitutional question, and the court of appeals discussed the question in a footnote (Pet. App. A20 n.18). And, although all petitioners rely heavily (No. 78-160 Pet. 12-13, 15-16; No. 78-161 Pet. 11; No. 78-162 Pet. 7, 10, 14) on this Court's decision in *University of California Regents* v. *Bakke*, No. 76-811 (June 28, 1978), no lower court has considered the constitutionality of Section 194 in light of the *Bakke* decision.

Accordingly, although petitioners and amicus American Land Title Association urge (No. 78-160 Pet. 12; No. 78-161 Pet. 8; No. 78-162 Pet. 6-7; American Land Title Association Br. 2-5) the Court to review this case on the ground that the decision upholding Section 194 may affect a large number of pending and potential actions, we believe that it would be inadvisable for the Court to consider the constitutionality of the statute without the benefit of the views of the lower courts, and without the experience gained from the application of the statute in a variety of factual contexts.

Moreover, although the court of appeals relied upon Section 194 in reversing the district court, the decision below may be independently correct without reference to the presumption announced in that section. As noted above, the court of appeals concluded that the district court had erred not only in placing the burden of proof on the Tribe, but also in applying state rather than federal law, and in defining the concept of avulsion too narrowly. And, in evaluating

the district court's findings regarding the nature of the river's movements during the two critical periods, the appellate court found the evidence supporting petitioners' theory of a gradual accretion insubstantial. The court of appeals found the trial court's conclusion about the river's movement between the first critical period, between 1879 and 1912, "clearly erroneous and not supported by substantial evidence" (Pet. App. A40). And with regard to the second critical period, between 1912 and 1923, the court found (*id.* at A64) that "[t]he little solid scientific evidence in the record contradicts the defendants' theory of how the river moved."[4]

2. Petitioners also contend (No. 78-160 Pet. 18-23; No. 78-161 Pet. 6-8; No. 78-162 Pet. 11) that Section 194 is, by its own terms, inapplicable to the

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[4] Finding that "in the present case the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum written by [petitioners]," the court of appeals repeated (*id.* at A23-A24 n.21) this Court's admonition in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964) (emphasis added by the court of appeals):

> Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. * * * *Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.* * * * Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States* v. *Forness*, 125 F.2d 928, 942, *and do not reveal the discerning line for decision of the basic issue in the case.*

instant case, because this is not an action between a single Indian and a single white person.

a. The court below did not discuss these contentions (which petitioners made in passing, but did not develop), and the issues of statutory construction are ones of first impression. For reasons similar to those discussed above, we believe the Court should not attempt to resolve the several questions raised regarding the construction of the statute without the benefit of any consideration of these issues by the lower courts.

b. In any event, there is no basis for petitioners' restrictive interpretation of Section 194. The court of appeals' construction of Section 194 effectuates the protective policy of the statute and is consistent with the cardinal principle that statutes enacted for the protection of Indians should be "liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976), quoting *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

The purpose of Section 194—to assure that Indians are not deprived of their lands unless non-Indians can affirmatively prove their claims—is equally applicable when the United States brings suit as trustee for the Indians, or when the tribe, rather than an individual Indian, is a party. Indeed, construing the statute as inapplicable to suits brought by an Indian tribe would make the statute inapplicable to protect most trust lands, since as a general matter " '[w]hatever title the Indians have is in the tribe, and not in

the individuals, although held by the tribe for the common use and equal benefit of all the members.' " *United States* v. *Jim*, 409 U.S. 80, 82 (1972), quoting *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902).

There is no merit to petitioners' suggestion (No. 78-160 Pet. 18-19; No. 78-161 Pet. 7) that the language in Section 194 was chosen with the intent of making Section 194 inapplicable to actions brought by Indian tribes. So far as the legislative history reveals, the use of the singular "an Indian" was substituted for the plural term "Indians," which had been used in the introductory portion of the predecessor to Section 194 (Section 4 of the Act of May 6, 1822, 3 Stat. 683), only to make the syntax of Section 194 consistent. The predecessor provision had shifted uncomfortably between plural and singular terms. It provided (emphasis added):

> *And be it further enacted*, That, in all trials about the right of property, in which *Indians* shall be party on one side and *white persons* on the other, the burden of proof shall rest upon *the white person*, in every case in which *the Indian* shall make out a presumption of title in *himself* from the fact of previous possession and ownership.

There is no evidence that the change to the use of singular terms throughout Section 194 was intended to make the statute inapplicable to suits brought by a tribe.

Petitioners also argue (No. 78-160 Pet. 19-21; No. 78-161 Pet. 6-7; No. 78-162 Pet. 11-12) that the court of appeals erred in assuming that Section 194 applies to any action between an Indian and a non-Indian, including corporations, states, or non-Caucasians. This contention is equally without merit. Petitioners place primary reliance on this Court's decision in *United States* v. *Perryman*, 100 U.S. 235 (1879), which held that the term "white person" as used in a related provision did not include a black person. Although the provision interpreted in *Perryman*, Section 16 of the Act of June 30, 1834, 4 Stat. 731, was part of the same enactment that included Section 194, Section 16 had a far different legislative history. As this Court concluded in *Perryman*, the words "a white person" were substituted in Section 16 in place of the broader language used in an earlier enactment with the intent of excluding from the coverage of Section 16 fugitive black slaves who might seek refuge among tribes such as the Cherokees. 100 U.S. at 238. Since there was no analogous change made in the language of Section 194, *Perryman* provides no support for petitioners' argument. Whereas the narrow use of the term "white person" in *Perryman* served a specific legislative purpose, the narrow interpretation petitioners seek to place on Section 194 would completely undermine Congress' protective policy. The protection of Section 194 could be avoided by Caucasian individuals through the simple expedient of forming a corporation, and no protection of any kind would exist against claims of any non-"whites." Construing Section 194 as applicable to

actions between Indians and non-Indians is far more consistent with Congress' protective policies.[5]

3. Petitioners next contend (No. 78-160 Pet. 23-24; No. 78-161 Pet. 11-12) that the court of appeals erred in applying federal, rather than state, principles of accretion and avulsion. Iowa and the amici States urge that the application of state law violates the established principle that state law governs real property disputes, including questions of title to riparian lands along navigable rivers within the states (No. 77-161 Pet. 11).

As the court of appeals concluded, there are two independent grounds for rejecting this contention: federal law governs, first, because an interstate boundary is involved, and, second, because the Tribe is asserting a federally created and protected right

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[5] Contrary to Iowa's argument (No. 77-161 Pet. 7) that "[r]eading person to include states violates the plain meaning of the words used, both in the sense of their common usage and as interpreted by the Court in other contexts," this Court has on numerous occasions construed the statutory term "person" as including states. See, *e.g.*, *Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 261 (1972) (Section 4 of the Clayton Act, 15 U.S.C. 15); *Sims* v. *United States*, 359 U.S. 108, 112 (1959) (Section 6332 of the Internal Revenue Code of 1954, 26 U.S.C. 6332); *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (26 U.S.C. (1928 ed.) 205). Cf. *Pfizer Inc.* v. *India*, 434 U.S. 308, 311-313 (1978) (foreign nation a "person" under Section 4 of the Clayton Act); *Monell* v. *Department of Social Services*, No. 75-1914 (June 6, 1978) (local government units "persons" under 42 U.S.C. 1983). Petitioners' reliance (No. 77-161 Pet. 7) on *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), is misplaced, since that case holds only that the states have never been considered to be "person[s]" within the meaning of the Due Process Clause of the Fifth Amendment.

that state law cannot unilaterally extinguish (Pet. App. A13-A20).

As this Court held in *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977), if a navigable stream forms the boundary between two states, federal common law governs "the effect of a change in the bed of the stream on the boundary." Although the boundary between Iowa and Nebraska is now set by an interstate compact independent of the river,[6] the court of appeals correctly held that the principle noted in *Corvallis* justified the application of federal law in the instant case, because the river did form the boundary between Iowa and Nebraska (as well as the boundary of the reservation) at the time of the disputed changes (Pet. App. A14-A15). Since the boundary of the reservation was coextensive with the interstate boundary at the time in question, the location of that boundary was governed by federal law.[7]

Further, as the court of appeals noted (Pet. App. A15-A19), there is a second and independent basis for the application of federal law. The Tribe's claim, like that asserted by the Oneidas in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 677 (1974),

[6] Iowa-Nebraska Boundary Compact, ratified by the Act of July 12, 1943, 57 Stat. 494.

[7] Moreover, as the court of appeals pointed out (Pet. App. A15 & n.12), the location of the interstate boundary prior to the adoption of the compact is not a matter of merely academic interest, since the compact requires both states to recognize pre-1943 titles good in the state where the land was then located.

> does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

To apply state law in the instant case would, in effect, permit the state unilaterally to abrogate rights created by treaty and continuously protected by the United States. Although state law may properly determine the incidents of rights which attach to the ownership of property held in trust for the Tribe by the United States, state law may not extinguish title to tribal reservation lands.[8]

[8] The amici States of Indiana, Alaska, et al., seek to distinguish *Oneida Indian Nation* on the ground that there was no dispute there that Indian land was involved, whereas that is precisely the question here (Br. 13-14). To the contrary, however, the Tribe established that the area in question was Indian land within its reservation at the time of the Barrett survey in 1867. The question in the instant case, like that in *Oneida Indian Nation*, *supra*, is whether the Tribe's rights were extinguished by subsequent events. In both cases, the question whether the tribe's federal title was extinguished was governed by federal law. The court of appeals' reasoning is fully consistent with *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 377, where the Court quoted with approval the following passage from *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839) (emphasis by the Court in *Corvallis*):

> We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether*

Accordingly, the court of appeals' determination that federal comon law governed the instant case is correct, and follows the prior decisions of this Court.[9]

4. Finally, petitioners urge (No. 78-160 Pet. 23-29) that the court of appeals was mistaken in defining federal principles of accretion and avulsion. They argue that the court erred in ruling that an avulsive change can occur when the thalweg, or channel of the river, changes location within the bed of a river, and in ruling that an avulsive change can occur even if no identifiable land remains in place when the channel changes course.

The court of appeals correctly ruled (Pet. App. A34) that the essential aspect of avulsion is "the sudden, perceptible change of the channel, whether within or without the river's original bed." The court recognized that whether the river's change leaves an identifiable land mass in place is a factor to be considered in determining whether a change in the river is due to accretion or avulsion, but it concluded that a change may be avulsive even though "intervening

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a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation* * * *.

[9] In any event, the precise question presented here—what law governs a dispute involving a reservation boundary once coextensive with an interstate boundary—is a narrow one, and we question whether the issue is of sufficient general importance to warrant review by this Court.

land may not be visible at the time a sudden flood or freshet occurs" (*id.* at A34-A35). On this point the court followed its earlier decision in *Uhlhorn* v. *United States Gypsum Co.*, 366 F.2d 211, 219-220 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967), where it found that an avulsive change had occurred although the sandbar separating the old and new channels was as much as four feet under water when the change occurred. Accord: *Nolte* v. *Sturgeon*, 376 P.2d 616, 620-621 (Okla. 1962).

The court's ruling is not inconsistent with the prior decisions of this Court. Although, as petitioners point out, this Court approved the Special Master's report in *Louisiana* v. *Mississippi*, 384 U.S. 24 (1966), the master based his conclusions that the changes in the Mississippi River had resulted from accretion not only on his ruling (quoted at No. 78-160 Pet. 26) that a change in the channel within the bed of a river does not constitute an avulsion, but also upon his finding that the channel had moved gradually, not suddenly (Special Master's Report, No. 14 Original, 1962 Term at 20). This Court's per curiam affirmance, without discussion, did not establish the correctness of the master's conclusion that no avulsion could have occurred even if the change in the channel had been sudden.

Petitioners' reliance on *Nebraska* v. *Iowa*, 143 U.S. 359 (1892), is also misplaced. In that case the Court considered the question whether the traditional concepts of accretion and avulsion could be applied to the Missouri River, where the force of the river

caused the normal processes of gradual erosion to operate so rapidly that "it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible." 143 U.S. at 369. The Court concluded that even the relatively rapid erosion of the soil of the banks during the periodic rises in the current was accretion, not avulsion. 143 U.S. at 369-370. It did not hold that avulsion may not take place where, as here, the channel shifts suddenly within the bank, even if the identifiable land left in place is not above the high water mark. In the latter circumstance, the rationale this Court has identified for the doctrine of avulsion—"a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners"—is fully applicable. See *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 327 (1973), overruled on other grounds, *State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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